



**EARTHJUSTICE**

*Because the earth needs a good lawyer*

December 21, 2015

By Email

FOIA Officer  
FOIA and Privacy Branch  
Office of Environmental Information  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, D.C. 20460

Hq.foia@epa.gov

Re: Freedom of Information Act Request For Information Pertaining to Surface  
Impoundments and New Dam Safety Requirements

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, I hereby request a copy of information submitted to the United States Environmental Protection Agency ("EPA") by the electric utility industry or their representatives, the Utility Solid Waste Activities Group ("USWAG"), between December 1, 2014 and December 1, 2015 pertaining to existing coal combustion residuals ("CCR") surface impoundments. Specifically, I request the following documents:

- (1) A copy of all correspondence, memoranda, data, reports, notes, or other records submitted by the electric utility industry or USWAG pertaining to the new structural integrity criteria, known as "dam safety factors," in the CCR rule signed by EPA on December 14, 2014. These documents may include information pertaining to any surface impoundments that are subject to the new requirements, including the difficulties any particular plant may experience with regard to compliance dates; and
- (2) A copy of all correspondence, memoranda, data, reports, meeting notes, phone records, emails or other written records by EPA personnel concerning the information submitted above pertaining to CCR surface impoundments subject to the new requirements.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.



To the extent that relevant records are available electronically, please provide these records in that format.

Please direct this inquiry to the Office of Solid Waste and Emergency Response. Following the CCR rule's promulgation on December 14, 2014, USWAG met with EPA to discuss the new structural integrity criteria.

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. §552(a)(4)(A)(iii) and 5 C.F.R. §1303.70. We have received fee waivers under FOIA from EPA and other federal agencies in the past. This is because Earthjustice has, since 1971, promoted the public interest through the enforcement of federal environmental laws and the advancement of policies that provide enhanced environmental protection.

### **Fee Waiver Request Justification**

Earthjustice is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, Earthjustice intends to use the requested information to inform the public, so the public can better understand the operations and activities of the EPA with respect to the regulation of coal combustion residuals under the Resource Conservation and Recovery Act (RCRA).

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA's regulation of CCR surface impoundments under RCRA. CCR disposal units were the subject of EPA's recent rulemaking governing the disposal of coal ash in landfills and surface impoundments. Information regarding the structural integrity of CCR impoundments and issues related to compliance and utility management unquestionably involve the efficacy of the newly promulgated rule. This information is clearly related to “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the “likely to contribute” determination hinges in substantial part on whether the requested



documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of your agency’s decisions and EPA’s operations and activities because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the importance of the issue to public safety and the environment, the records requested should be made available to the public. The documents requested are “meaningfully informative” and “likely to contribute” to a greater understanding of EPA’s operations and activities with respect to its newly promulgated CCR rule.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

Earthjustice has a longstanding interest and expertise in the rulemaking governing coal ash disposal. More importantly, Earthjustice unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

Earthjustice intends to disseminate the information they receive through this FOIA request regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and email, posting on Earthjustice’s website, and list-serve distribution to members of the public interested in EPA’s regulation of coal ash. In addition, Earthjustice maintains a webpage solely devoted to coal ash at [www.earthjustice.org/coalash](http://www.earthjustice.org/coalash), and Earthjustice routinely uses this webpage to disseminate information.

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently significant public concern regarding the new coal ash rule and, particularly, the safety and stability of existing coal ash surface impoundments. The rule promulgated by EPA is a self-implementing rule, and citizens have a substantial role in enforcement of the rule. Information concerning compliance with the rule’s requirements is essential to the public. Disclosure of the requested records will significantly enhance the public’s understanding of compliance issues concerning important safety provisions of EPA’s new rule.

Absent disclosure of the records requested, the public’s understanding will be shaped only by limited and dated information. The disclosure of the requested records is essential to public understanding of the impacts that coal combustion residuals disposal may have on the safety of communities and the environment. After disclosure of these records, which pertain to the structural stability of impoundments containing millions of tons of toxic waste, the public’s understanding of this problem will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.



5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

Earthjustice has no commercial interest in the requested records. Nor does Earthjustice have any intention to use these records in any manner that "further a commercial, trade, or profit interest" as those terms are commonly understood. Earthjustice is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such it has no commercial interest. The requested records will be used for the furtherance of Earthjustice's mission to investigate potential threats to public health and the environment and to inform the public on matters of vital importance to the environment and public health, including the disposal of coal combustion residuals.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, Earthjustice has no commercial interest in the requested records. Disclosure of this information is not "primarily" in Earthjustice's commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of the scope and magnitude of coal combustion residual disposal sites.

Earthjustice thus respectfully requests, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A).

In the event that your Office denies a fee waiver, please send a written explanation for the denial but continue to produce documents until the fee reaches \$100.

Please produce the requested records on a rolling basis. At no time should the Office's search for, or deliberations concerning, any records requested herein delay the production of other records that the Office has already elected to produce.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. See 10 C.F.R. §1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

In addition, should you invoke a FOIA exemption regarding any of the requested records, we request that you release any segregable portions of such records that are left after the exempted material has been redacted from the records we are seeking.

I appreciate your help in obtaining the requested information. As provided in FOIA, I expect a reply within 20 working days. 5 U.S.C. §552(a)(6)(A)(iii); 5 C.F.R. §1303.10(c).

Please send the requested records by email to [levans@earthjustice.org](mailto:levans@earthjustice.org) or, for records not available electronically, by regular mail to 21 Ocean Avenue, Marblehead, MA 01945. If you find that this request is unclear in any way, please do not hesitate to contact me by phone at (781) 631-4119.

Thank you for your time and assistance. I look forward to your prompt reply.

Sincerely,

Lisa Evans  
Senior Administrative Counsel  
Earthjustice  
781-631-4119